HH 146-2002
HC 7463/01
Ref: HC 7132/01

CHENGETAI MASENGA
versus
DOUGLAS ROY GUTHRIE
and
TARUWONA MUSHORE
versus
CHAPUNGU SCULPTURE PARK

HIGH COURT OF ZIMBABWE
NDOU J
HARARE 7 March and 28 August 2002

Mr *O. Ziweni,* for the applicant
Mr *G.S. Wernberg,* for the respondents

NDOU J: Tapfuma Gutsa, perhaps more than any other of the "second generation" of Zimbabwean stone sculptors, has broken free from the traditions already established in this young movement. Often using a combination of materials, such as stone, metal, wood, wire, paper and string, he strives to express contemporary as well as traditional ideals in his work to a local as well as international audience. This application is about one of his works known as "the Rainmaker". The "Rainmaker" was collected and displayed at Chapungu Sculpture Park (third respondent) by Douglas Roy Guthrie (first respondent). Taruwona Mushore (second respondent) is responsible for administration and sales of sculptures at Chapungu Sculpture Park. She is also first respondent's assistant. She also happens to be the common law wife of the first respondent and they have a child together. The first respondent started business of the third respondent about 30 years ago. The "Rainmaker" is a very large piece of sculpture. It had been at the Chapungu Sculpture Park for quite a few years. During this time, it was often admired but nobody bought it, mainly because the price was very high by local standards. On 24 June 2001, one Aaron Learnard, a salesman in the employ of the respondents sold the "Rainmaker" to the applicant who purported to be acting on behalf of Hear the Word Ministries, Harare. The purchase price of $360 000 was paid on 24 June 2001. An invoice was made out which reflected "To collect when crated 25/06/2001". A receipt was issued acknowledging the payment of the purchase price – Receipt Number 131/176. The applicant was also given a Certificate of Authenticity. The applicant went to collect the "Rainmaker", on 25 June 2001.

The applicant was not given the "Rainmaker" instead the respondents offered to refund the $360 000. The respondents' case is that when this transaction took place, the first respondent was in Europe. When the second respondent informed him of the sale, he immediately told the second respondent that he had already sold the "Rainmaker" to their associate company in Britain and he asked the second respondent to arrange for the return of the purchase price and an apology to the applicant for the mistake. Respondents' case is further that they made valiant attempts to contact the applicant through Hear The Word Ministries without success. The first respondent wrote a letter to Hear The Word Ministries on 5 July 2001 to ask for their assistance in resolving the matter. The latter did not respond. Whilst still in Europe the first respondent asked the second respondent to arrange for the "Rainmaker" to be removed from Chapungu Sculpture Park premises to their matrimonial home. This move resulted in the applicant seek a provisional order from this court by way of an urgent application. On 30 July 2001 GILLESPIE J issued a provisional order in the following terms:

> "Terms of the Order Made:
>
> That you show cause to this Honourable Court why a final order should not be made in the following terms:-
>
> 1. That the Sculpture known as "Rainmaker" shall not be removed from Zimbabwe, pending the determination of an action to be instituted by Hear The Word Ministries against Chapungu Sculpture Park and the Sculpture, which action shall be instituted not later than 3rd September 2001, failing which, this action shall be deemed to have been discharged.
>
> 2. That costs of this application shall be determined on the return day.
>
> Terms of the Interim Relief Granted
>
> 1. That pending the confirmation or discharge of this provisional order, the sculpture "rainmaker" shall not be removed from Zimbabwe.
>
> Service of This Provisional Order
>
> That the Applicant shall serve a copy of this provisional order upon the Sculptor."

On 3rd August 2001, the applicant approached this Court by way of a court application. The court application, contrary to the directions by this court, was not

served of the fourth respondent Tapfuma Gutsa although he now stands cited as the fourth respondent. The applicant seeks an order in the following terms:

"It is Ordered:

1. That respondents be and are hereby ordered and directed to deliver to applicant at 3rd Respondent's place of business the sculpture known as the "Rainmaker" within 24 hours from the date of service of this order upon them.

2. That in the event of non-compliance, by respondents with this order within the stipulated period after service of the order, upon them, applicant be and is hereby given leave to set this matter down on the same papers for the court to consider why respondents should not be held to be in contempt of court.

3. That the 1st, 2nd and 3rd Respondents shall pay the costs of this application, including the costs of the proceedings in HC 7132/01 jointly and severally, the one paying, the others to be absolved on a legal practitioner and client scale."

It is clear that although the applicant purports to seek the confirmation of the provisional order granted by GILLESPIE J, the draft order suggests that the final order being sought is materially different from the terms of the one provisionally granted.

Two issues have to be determined in this matter. The first one is whether the applicant has the requisite legal standing to institute these proceedings on behalf of Hear The Word Ministries. The second issue is whether the applicant is entitled to a final order in light on her failure to comply with the directions given by GILLESPIE J at the time he granted the interim order. Both these issues seem to centre around one question i.e. Is the applicant properly before me?

The legal principle of *locus standi in iudicio* has been described as follows:

> "The standard action procedure comprises the bilateral interaction of two parties: the plaintiff and the defendant. This basic principle which has been extended to include other persons as parties to an action. ... The capacity to participate in legal proceedings is technically described by the phrase *locus standi in iudicio* and has been succinctly summed up in the following terms:
>
> > 'The right to sue or the liability to be sued depends in the first place on capacity. In order to be capable of either suing or being sued, a person must have *locus standi in iudicio*. Consequently persons who are wanting in that capacity cannot be parties to any civil action unless that want has first been implemented.'
>
> In all cases a plaintiff must allege sufficient facts in his declaration or particulars of claim to indicate that he has the necessary *locus standi* to institute proceedings."

- See *Introduction to South African Law and Theory* (2nd Edition) by WJ Hosten, AB Edwards, F. Barman and J Church and also *Wilson v Zondi* 1967 (4) SA 713 (N).

The exception to this basic principle in actions brought in terms of the provisions of the Class Action Act [*Chapter 8:*17]. The provisions of the latter Act do not apply to the facts of this case. In order to establish the *locus standi* the applicant filed a Special Power of Attorney purporting to appoint her as an agent of Hear The Word Ministries. The Power of Attorney was under signed by a Mr Kundishora Muringani who stated that he was the Cell Administrator of Hear The Word Ministries. The Power of Attorney is dated 3 August 2001. On 2 November 2001, Hear The Word Ministries' legal practitioners address a letter in the following terms:

> "We act on behalf of Hear the Word Ministries. We advise that we have been the legal practitioners acting on behalf of this *universitas* for at least the past ten years in respect of all litigation and legal work required by it.
>
> We note that you have instituted proceedings on behalf of Chengetai Masenga, purportedly acting under authority of Hear the Word Ministries in respect of the abovenamed matter. We note that the authority upon which you are basing such action is a Special Power of Attorney granted on the 3rd August 2001 by Kundishora Muringani in favour of Masenga.
>
> Please be advised that Mr Muringani is an employee of Hear the Word Ministries in a relatively minor administrative role. He possesses no capacity or authority from Hear the Word Ministries to prepare the Special Power of Attorney which he has purported to do. Hear the Word Ministries has not given any such authority to Mr Muringani and, accordingly, Mr Muringani did not have the capacity to pass such authority on to Chengetai Masenga."

Notwithstanding such categoric challenge to her capacity to act as an agent of Hear the Word Ministries the applicant seems determined to act on the said church's behalf. It is strange that she would want to act on behalf of such an unwilling "principal". It seems understandable why a church like Hear the Word Ministries is unwilling to be associated with the "Rainmaker". The circumstances of this case are such that the applicant would have easily litigated in her own right without involving Hear the Word Ministries. I cannot understand why she chose to sue as an agent of the church. From the facts it does not seem the church has anything to do with the acquisition of this piece of art. Be that as it may, for whatever reason, she chose to be an agent of Hear the Word Ministries and all I have to decide is whether she has established such authority to act as an agent. There is a material dispute of fact on the question of agency. The Special Power of Attorney by a church employee is disputed by the church. This dispute cannot be resolved on paper even if I adopt a robust approach. In the circumstances, the applicant has failed to establish that she has authority to bind her alleged principal, Hear the Word Ministries. It is trite that the authority of the agent may be created expressly or impliedly – see *Tuckers Land and Development Corporation (Pty) Ltd v Perpellief* 1978 (2) SA 11 (T) at 14-15 and *Freeman and Lockyer v Burckhurst Park Properties (Mangal) Ltd* [1964] 1 All ER 630 at 644 and *Hely-Hutchinson v Brayhead Ltd* [1967] 3 All ER 98 at 102. The applicant seems to be relying on expressly created authority because she produced the Special Power of Attorney. Even before this application was launched, the applicant was aware that the alleged principal, Hear the Word Ministries, challenged

this agency. It is difficult to understand why she chose the route of court application instead of an action.

The second issue is that of ignoring the directions contained in provisional order granted by GILLESPIE J on 30 July 2001. In the provisional order reference is made to "pending the determination of an action to be instituted by Hear the Word Ministries against Chapungu Sculpture Park and the Sculptor, which action shall be instituted no later than 3rd September 2001, failing which, this action shall be deemed to have been discharged." The applicant, has ignored the express terms of this provisional order in many respects. First, she proceeded by way of a court application when the order says the matter must proceed by way of an action. I am convinced that the term "action" was deliberately used. The facts are such that it could not have been used in the generic sense. Second, the order states that the action has to be instituted by Hear the Word Ministries. In this regard, both in principle and on the authority it is not proper for an agent to sue as representing his/her principal by suing in his/her own (agent's) name where the claim being enforced is that of the principal and the principal is the true plaintiff – see *Sentrakoop Handelaars Bpk v Lourens and Ano* 1991 (3) SA 540 (W); *Leslies Trustee v Leslie* 1903 TS 701; *Clark v Van Rensburg and Ano* 1964 (4) SA 153 (O). In this case the applicant does not purport to act on behalf of an undisclosed principal so I will not deal with principles relating to suing on behalf of an undisclosed principal. Even in the face of explicit directions contained in the interim order the applicant still chose to sue in her name. She, however, added next to her name (<u>For and on behalf of Hear the Word Ministries duly authorised by a Special Power of Attorney</u>). I have already indicated the problems with her authorisation to act on behalf of the Church and as such the addition of the highlighted words does not advance her case any further. It is clear from the evidence in the applicant's papers that it is not being suggested that she acquired rights in her own name. Applicant clearly states that she made the offer for the sculpture on behalf of Hear the Word Ministries. To exacerbate applicant's difficulty even further, the question of whether she had authority to perform the sale has been specifically questioned by the respondents. The cell administrator's (Pastor Muringani's] authority to bind the church has been questioned. The second respondent places on record in her affidavit that she specifically spoke to Pastor Muringani, with respect to the church's

involvement with respect to its interest in the sculpture and that pastor Muringani categorically stated that the church had no knowledge nor interest in the sculpture in question. The applicant has not rebutted these allegations by Pastor Muringani, as would be expected through an answering affidavit. In her answering affidavit, the applicant avoids dealing with Pastor Muringani's statement that the church is not involved, altogether, and furthermore she does not explain Pastor Muringani's comments in view of the purported Special Power of Attorney allegedly signed by him. No explanation is given by applicant in her answering affidavit as to what a cell administrator is, despite respondents' submissions challenging a cell administrator's authority to bind the church. Neither is there a document or even a letter from the church explaining that the cell administrator has authority to bind it. There is no affidavit from the cell administrator ratifying the contents of the Special Power of Attorney. In the result, applicant has not established that she has any authority from the church to either purchase on behalf of the church or sue on behalf of the church. In the circumstances, Hear the Word Ministries, has not instituted these proceedings as directed by the terms of the interim order. With such disregard of the terms of the interim order this Court cannot hear the applicant. She is not approaching the court with clean hands. She did not comply with the express directions of this court when the interim order was granted – see *Maluleke c Dipont N.O.* 1967 (1) SA 574 (RAD) at 577C-578; *Mulligan Mulligan* 1925 WLD 164 and *Minister of Home Affairs v Bickle* 1983 (2) SA 457 (ZSC) at 464E-F.

In light of the above findings the applicant is not properly before this Court.

It is, in the circumstances, not necessary for me to deal with the other issues raised by the applicant. I accordingly dismiss the application with costs.

Ziweni & Company, legal Practitioners for applicant.

Gill, Godlonton & Gerrans, legal practitioners for the respondents.